In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. 549 and No. 550

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, et al.,
Petitioners,
vs.
THE UNION TRUST COMPANY, East 9th Street and Euclid Avenue, Cleveland, Ohio, et al.,
Respondents.
No. 549.

CARY R. ALBURN, Trustee under the Last Will and Testament of Charles H. Salmons, Deceased, et al.,
Petitioners,
vs.
THE NATIONAL CITY BANK OF CLEVELAND, Successor Trustee under the Agreement and Declaration of Trust dated August 15, 1924, etc. et al.,
Respondents.
No. 550.

BRIEF OF RESPONDENT, UNION PROPERTIES, INC., OPPOSING PETITION FOR WRITS OF CERTIORARI.

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TABLE OF AUTHORITIES.

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TABLE OF ABBREVIATIONS.

Burdick, *et al.*	Intervening defendants in both cases who are owners of Land Trust Certificates and intervened to insist that Petitioners were not representing the true interest of the Certificate Holders.
Certificate Holders	Owners of Certificates of Equitable Interest in Citizens Building Property under Land Trust created August 15, 1924.
DJR	Refers to pages of record in Declaratory Judgment case (case No. 549).
Duffy Br.	Refers to pages of brief of Ohio Attorney General.
Hart Rec. I .....; II	Refers to pages or volumes I and II of record in Supreme Court of Ohio in *Stanley, et al. v. Hart,* 142 O. S. 528.
Pet.	Refers to pages of Petition for Writs of Certiorari and supporting brief.
Petitioners	Refers to Petitioners in both cases in this Court, Cary R. Alburn, *et al.*
QTR	Refers to pages of record in Quiet Title case (case No. 550).
Respondents	Refers to all Respondents in both cases in this Court. All Respondents were defendants in both cases below, except The National City Bank of Cleveland, Successor Trustee, plaintiff in the Quiet Title case and defendant in the Declaratory Judgment case.
Trustee	The National City Bank of Cleveland, Successor Trustee of Land Trust Certificate issue since 1933, defendant in Declaratory Judgment case and plaintiff in Quiet Title case.

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INTRODUCTION.

Following the commendable practice adopted by Petitioners we shall file this one brief opposing the joint petition for writs of certiorari in these two cases.

There are no Federal questions involved in these cases and the decisions of the lower Courts are clearly right. As

pointed out by the Court of Appeals (QTR 77, 80-81; DJR 87, 90), Petitioners are merely attempting to relitigate in these two cases issues which have been "definitely and irrevocably" determined against them by the Supreme Court of Ohio in *Stanley v. Hart*, 142 O. S. 528 (1944) and in *State ex rel. Stanley v. Cook*, 146 O. S. 348 (1946). For convenience these cases will be hereafter referred to as the "*Hart* case" and the "*Cook* case" respectively.

A. PROCEEDINGS BELOW.

Petitioners' entire case is predicated upon the assertion that they were not accorded a hearing in the Courts below, particularly in the Quiet Title case. Thus they say (Pet. 7):

> "The Common Pleas Court sustained demurrers to all of the petitioners' pleadings in both cases asking for affirmative relief and at the same time struck from the files the answer of the petitioners in the Quiet Title suit (QTR 10). It then issued a decree *pro confesso* quieting title in the Successor Trustee (QTR 6-11). No evidence was adduced. Although expelling the petitioners, who were beneficiaries of the trust, from the case and denying them a hearing, the court did not expel the other beneficiaries, who had taken a position contrary to that of the petitioners, and permitted them to participate in the hearing on the merits (QTR 6-11)."

It is true that no evidence was adduced, since the cases were disposed of on demurrers, but it is not true that the Court expelled the Petitioners from the case or "issued a decree *pro confesso.*" On the contrary, in the Quiet Title case as in the Declaratory Judgment case, Petitioners were accorded a full and complete hearing both on briefs and oral argument *as to the merits* of the case made by their pleadings, *and were accorded an opportunity to plead further* when the Court held their pleadings in-

sufficient as a matter of law. Thus, Petitioners were given a full opportunity to improve their case (QTR 10, lines 17-20; DJR 5, lines 3-6). As a matter of fact the Petitioners received exactly the same treatment at the hands of the Court that the other beneficiaries received, that is the title of the Trustee was quieted for the benefit of all the beneficiaries including the Petitioners.

Petitioners' case rests upon the proposition that a party, whose pleadings have been found insufficient as a matter of law after a full hearing—either on demurrer or on motion to strike—, and who was accorded a full opportunity to amend such pleadings, has been denied his day in Court. Nothing could be more absurd.

1. Petitioners Were Accorded a Full and Fair Hearing Below.

The fact that Petitioners were accorded a full hearing in both cases as to the merits of the case made by their pleadings, and an opportunity to amend after the pleadings were held insufficient, is shown by the following brief summary of events from the record. (All References in this first summary are to the Record in Case 550, QTR.)

Common Pleas Court.

1946

June 8. Petition to Quiet Title filed by The National City Bank, Successor Trustee (1, 18).

July 5. Answers of the Superintendent of Banks, The Union Trust Company, and Union Properties, Inc. filed disclaiming any interest in Trust property (1, 23-24).

July 5. Motion by Cary R. Alburn, Trustee, *et al.* (present Petitioners) to intervene granted (1, 21-3).

July 10. Joint answer and cross-petition of Petitioners filed (1, 25-33).

October 26. Demurrers and motions to strike attacking Petitioners' answer and cross-petition filed by Respondents[1] (3, 4, 42-47).

December 16. Brief of Petitioners filed (4).

1947

April 7-10. Four days of oral argument as to merits of Petitioners' pleadings in both cases.[2]

April 10. Motion of Harold B. Burdick, *et al.*, Certificate Holders, who opposed Petitioners' position, for leave to become parties defendant filed (4, 49).

April 25. Petitioners filed objections to motion of Burdick, *et al.*, to be made parties defendant (4).

May 7. Petitioners filed supplemental brief (4).

June 10. Petitioners filed additional brief (4).

June 10. Petitioners filed brief opposing amended motion to intervene (4).

December 22. Petitioners allowed to amend cross-petition to insert references to *Hart* case and *Cook* case (5-6).

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[1] All respondents, except the Superintendent of Banks, filed demurrers or motions to strike, or both, addressed to the answer and cross-petition of the petitioners (QTR 3, 4, 42-7, 50). The Superintendent of Banks filed an answer in which he set forth (a) the five cases previously brought by petitioners, and (b) the adjudications in the *Hart* and *Cook* cases, and the effect thereof, and pointed out (QTR 41):

> "• • • that the certificate holders will be deprived of their property if the trust is held invalid since the Supreme Court of Ohio in the *Stanley* case (mandamus) forever barred the certificate holders from being claimants or creditors of said The Union Trust Company."

No reply was filed to this answer (QTR 3-4), and all its allegations stand admitted on the record (Ohio General Code 11326, 11346).

[2] The docket entries printed in the record do not disclose the fact of oral arguments in the Common Pleas Court, the Court of Appeals or the Supreme Court, but there is, of course, no dispute that they occurred.

1948

January 29. Petitioners filed answer to memorandum regarding injunction provision in Quiet Title decree (6).

February 10. Order sustaining demurrers to Petitioners' cross-petition, granting motions to strike Petitioners' answer and quieting title in The National City Bank as Trustee for Certificate Holders (6-11); this order includes the following:

p. 7, lines 1 to 10. Recitation by Court that joint answer and cross-petition of Petitioners is being passed on.

p. 8, Par. 3. Finding that Petitioners have no interest in property except as owners of Land Trust Certificates.

pp. 8-9, Pars. 4-6. Finding that other defendants have no interest in property except as owners of Land Trust Certificates.

p. 9, Par. 7. Finding that it is to the best interest of all parties that title be quieted.

pp. 9-10. Demurrers to cross-petition and motions to strike answer of Petitioners are sustained. Petitioners (Cary R. Alburn, Trustee, *et al.*) "*not desiring to plead further either by way of answer or cross-petition,*[3] said cross-petition is hereby dismissed and judgment is hereby rendered for the plaintiff against said intervening defendants."

Court of Appeals.

1948

February 16. Case docketed (12).

March 15. Brief of Petitioners filed (12).

March 26. Briefs of Respondents filed (12).

April 5. Petitioners' reply brief filed (12).

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[3] Emphasis appearing in quotations throughout this brief is ours unless otherwise noted.

April 7. Oral argument in Court of Appeals for a full day.

June 1. Opinion of Court of Appeals filed affirming judgment of Common Pleas Court (76-81).

June 11. Order entered affirming judgment of Common Pleas Court (12-13).

Supreme Court of Ohio.

1948

June 30. Notice of appeal filed (15, 62).

July 8. Petitioners' motion to certify and brief filed (15, 64).

August 28-September 1. Briefs of Respondents filed (15).

August 31. Motion by Respondents to dismiss appeal as of right filed (15, 69).

October 8. Petitioners' reply brief filed (15).

October 14. Oral argument in Supreme Court.

October 20. Motion to certify denied. Motion to dismiss appeal as of right granted (16).

November 2. Petitioners' application for rehearing filed (16).

November 10. Rehearing denied (16, 70-75).

The Record in Case 549, DJR.

Substantially the same sequence of hearings and rulings occurred in the Declaratory Judgment case (See DJR 1-9, 26-7, 34-44, 60-82, 86-91).

2. Petitioners' Pleadings Referred Specifically to the Prior Actions Between Same Parties On the Same Subject Matter.

Before the demurrers and motions to strike, addressed to Petitioners' original petition in the Declaratory Judgment case and to their answer and intervening cross-petition in the Quiet Title case, had been ruled upon, Peti-

tioners amended their petition and intervening cross-petition by inserting two paragraphs which appear in the entries of December 22, 1947 (DJR 3-4; QTR 5-6). These paragraphs refer to the prior actions between the same parties dealing with the same subject matter, specifically to the cases of *Stanley v. Hart,* 142 O. S. 528 (1944), and *State ex rel. Stanley v. Cook, Superintendent of Banks,* 146 O. S. 348 (1946). These allegations show that each of the previous suits was brought by some of the present Petitioners "on behalf of all certificate holders," and that both suits related to the same subject matter and the same "agreement and declaration of trust described in this petition (cross-petition)."

The effect of these allegations was to bring before the trial court, and of course each reviewing court, the previous litigation between these parties upon the same subject matter and to make available to those Courts on Respondents' demurrers and motions to strike the records and holdings in those previous cases.

This single fact in the proceedings below was of vital significance because it enabled the Court to have before it the prior adjudications and the records of those adjudications, together with Petitioners' admission that such litigation was between the same parties as to the same subject matter.

B. THE FACTS.

The facts are not fully or accurately set forth by Petitioners (Pet. 2-8) but in view of the previous adjudications between the parties and the limited grounds upon which Petitioners seek or could be entitled to the issuance of a writ, a detailed review of the facts is unnecessary.

One fact has been so consistently and persistently misstated throughout this long litigation that it deserves passing attention. Petitioners assert that The Union Trust Company derived a profit in excess of $1,695,000 from the sale of the Land Trust Certificates (Pet. 2-3). Petitioners

fail to state, however, that they arrive at this conclusion—it is of course merely a conclusion—by comparing the original cost of the *vacant* property in 1901—$310,000—(DJR 61; Pet. 2) with the price which was received for the certificates in 1924, 23 years later, after a 14-story office building had been erected upon the property. (Hart Rec. I-467.) It is, of course, absurd to suggest that the bank derived any such profit from the sale of the certificates under such circumstances.

ARGUMENT.

The two cases here presented are the sixth and seventh cases between the parties over the last eight years regarding this subject matter. Different phases of this matter have been presented on oral arguments to the Supreme Court of Ohio nine different times in the last six years. We shall not review this litigation in detail but it is important to bear in mind the second and fifth cases brought by Petitioners' counsel because (a) both of them were specifically referred to in Petitioners' pleadings in the instant cases (DJR 3-4; QTR 5-6), (b) both of them were decided by the Supreme Court of Ohio, and (c) the records of both cases were before the Supreme Court of Ohio under the Ohio Rule as to judicial notice of prior litigation between the same parties on the same subject matter.[4] The five cases referred to are described in the answer of the Superintendent of Banks to the cross-petition of Petitioners (QTR 39-41). We mention only the second and fifth cases.

(2) In *Stanley, et al. v. Hart*, 142 O. S. 528 (1944), Common Pleas Court, Cuyahoga County, No. 515,986; Court of Appeals, No. 19,058; Supreme Court No. 29,520 (the *Hart* case), plaintiffs, some of the present Petitioners, suing on behalf of all Certificate Holders, sought to set

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[4] For discussion of Ohio Rule as to judicial notice on this subject see *infra*, pp. 10-12.

aside the Citizens Building land trust and to have claims allowed against The Union Trust Company in liquidation for the amount of the total certificate issue. This relief was denied by the trial court on the ground that plaintiffs had failed to file a claim in the liquidation proceeding within the time limited by Section 710-92a of the Ohio General Code (the McIntyre Act[5]), 29 Ohio Opinions 35 (1942). This case was heard *de novo* in the Court of Appeals on the same record and that Court held unanimously that the Certificate Holders were not entitled to any claim against The Union Trust Company in liquidation. (Hart Rec. I-129, 130.) This judgment was later affirmed by the Ohio Supreme Court without opinion by an equally divided Court. 142 O. S. 528 (1944).

(5) *State ex rel. Stanley, et al. v. Cook, Superintendent of Banks, et al.*, No. 30,007, 146 Ohio St. 348 (the *Cook* case), was an original action in mandamus in the Ohio Supreme Court to compel the Superintendent of Banks to treat the Citizens Building land trust as void. This action was brought by the same parties as relators who had been plaintiffs or intervening plaintiffs in the *Hart* case. The Supreme Court rendered final judgment for the defendant Superintendent of Banks in that case, and held (p. 366):

> "The effect of the *Hart case was to deprive the relators permanently of any standing, either legal or equitable, as creditors of The Union Trust Company on account of their holdings of such trust certificates.* * * *"

and again (p. 371):

> "* * * it was held definitely and irrevocably in the *Hart case* that no certificate holder of the class represented by relators here was (or is) entitled to the status of a creditor of The Union Trust Company. * * *"

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[5] The McIntyre Act is printed as Appendix A to the petition (Pet. 31).

The Court specifically held that the Superintendent of Banks had no duty to compel the observance of the law generally or to enforce the public policy of the State. See paragraph 7 of syllabus, and pages 375-6.

Thus it was affirmatively established in the *Hart* case and specifically and emphatically recognized by the Ohio Supreme Court in the *Cook* case that the Certificate Holders, including the Petitioners and all the other Certificate Holders, are forever barred and deprived from participating "as creditors of The Union Trust Company on account of their holdings of such trust certificates." This holding of the Supreme Court, brought before the Common Pleas Court by Petitioners' allegations with respect to these two previous cases, was in large measure the foundation of the decision of the courts below.

I. THE RULE IS FIRMLY ESTABLISHED IN OHIO THAT A COURT WILL TAKE JUDICIAL NOTICE OF THE RECORD AND PROCEEDINGS IN A CASE PREVIOUSLY BEFORE IT INVOLVING THE SAME SUBJECT MATTER AND PARTIES.

It is the clearly established law of Ohio that a Court will take judicial notice of the record and proceedings in a case previously before it involving the same subject matter and parties.

Hughes v. Bd. of Revision, 143 Ohio St. 559, 560; 56 N. E. 2d 63, 64 (1944);

Klick v. Snavely, 119 Ohio St. 308, 309; 164 N. E. 233, 234 (1928);

State, ex rel. Gaede v. Guion, 117 Ohio St. 327, 328; 158 N. E. 748 (1927);

State, ex rel. Galloway v. Industrial Commission, 115 Ohio St. 490, 492; 154 N. E. 736 (1926);

Cook v. The Guardian Trust Company et al., 43 O. Abs. 318, 320; 62 N. E. 2d 291, 292-3 (Ct. of App. Cuyahoga County 1945).

In the *Hughes* case just cited the Supreme Court said (143 O. S. 560):

> "* * * This court will take judicial notice of the record in a case previously before it, involving the same subject matter and party. * * *"

The Court will recall that prior to the ruling on the demurrers and the motions to strike in the Common Pleas Court Petitioners had amended their pleadings in both cases by referring specifically to the *Hart* case and the *Cook* case and reciting that those cases had been brought by "some of the plaintiffs (defendant cross-petitioners) herein on behalf of all certificate holders" and that both suits related to the same subject matter and the same "agreement and declaration of trust described in this petition (cross-petition)." (*supra*, pp. 6-7; DJR 3-4; QTR 5-6.) In view of these allegations—making it clear by Petitioners' admission that the prior adjudications had been between the same parties and upon the same subject matter—the Courts in ruling upon the demurrers and motions to strike had before them as a matter of judicial knowledge all the records and proceedings of the two prior cases in the Supreme Court to which reference was specifically made by Petitioners.

With those records and decisions before the Court it was inevitable that the Court should reach the conclusion that the only real issues involved in the case had been previously adjudicated against the Petitioners and that there was no occasion to adjudicate them again. Thus the Court of Appeals, in affirming the action of the Common Pleas Court which had sustained the demurrers and the motions to strike, said (DJR 87; QTR 77):

> "We reach this conclusion primarily because it is our opinion that the questions here presented have heretofore been fully litigated and determined in the cases of *Stanley et al., vs. Hart*, Common Pleas Court of Cuyahoga County Case No. 515,986, Court of Appeals No. 19,058, 142 O. S. 528, and in the case of

> *State ex rel. Stanley v. Cook, Sup. of Banks etc. et al.*, an original action in mandamus in the Supreme Court of Ohio, 146 O. S. 348."

and again (DJR 90; QTR 80-81):

> "It is also our view that in these cases plaintiff's petition in the declaratory judgment case and the cross-petition in the quiet title case constitute an attempt to secure the overruling of the decision in the *Hart* case."

Thus it is clear that the Ohio Courts had before them the prior adjudications between the same parties upon the same subject matter which had been specifically pleaded by Petitioners in their amendments of December 22, 1947, and relied upon those previous adjudications between the parties in holding that Petitioners' pleadings disclosed no cause of action in the Declaratory Judgment case and no defense or cross-claim in the Quiet Title case.

II. IN VIEW OF THE ESTABLISHED FACT THAT PETITIONERS HAD A FULL AND FAIR HEARING IN THE COURTS BELOW, NO FEDERAL QUESTION IS PRESENTED AS A BASIS FOR ALLOWANCE OF THE WRITS.

Petitioners have presented four reasons for allowance of the writs and each of them is wholly devoid of substance. Each of the reasons is based upon the wholly false assumption that a party whose rights are adjudicated by sustaining a demurrer or motion to strike—thus determining that his pleadings present no cause of action or no defense—has been denied a hearing. As we have already seen (*supra*, pp. 3-6) Petitioners were allowed to file briefs supporting their pleadings and to present their arguments orally in both cases in all three Courts below, and in both cases the Courts decided that the pleadings were inadequate and stated no cause of action in the Declaratory Judgment case and stated no defense or no valid cross-claim in the Quiet Title proceedings. Let us examine the four reasons advanced by Petitioners and the cases cited in support thereof.

A. The First Reason.

Three case are cited in support of the first reason (Pet. 13). The first two cases deal with forfeitures of land from citizens of Virginia during the war between the States and merely hold that where the land owner's answer was stricken bodily from the record and he was allowed no opportunity to defend that there was no valid proceeding. In the third case it was held that striking a defendant's answer because he was guilty of contempt and refusing to allow him to defend was a failure of due process.

No such situation was presented by the cases at bar. Petitioners' pleadings are part of the record, are here presented, and were held to be wholly inadequate by the lower Courts in that they stated no cause of action or no defense. In ruling upon the merits of Petitioners' case as presented by their pleadings the lower Courts did exactly what Courts do every day in ruling upon demurrers or other questions arising upon pleadings.

B. The Second Reason.

Petitioners' second reason (Pet. 13) is equally fallacious and based again upon the false assumption that they were not accorded a hearing. The cases cited have no tendency to support the contention here made. In *Hansberry v. Lee*, 311 U. S. 32 (1940), this Court merely held that a prior adjudication between different parties was not binding upon the current litigants since the prior case was not a true class suit, did not even purport to be, and did not relate to any common property or contract interest.

In *McArthur v. Scott*, 113 U. S. 340 (1885) this Court merely held that a decree setting aside a will in a will contest proceeding in Ohio to which no executors or trustees were parties (p. 396) and which gave every appearance of being a collusive proceeding (p. 394) was not binding on after-born beneficiaries of the trust who were not made

parties or represented in any way under the doctrine of virtual representation.

Smith v. Swormstedt, 57 U. S. 288 (1853) involved the property rights in the Methodist Book Concern resulting from the split between the Methodist Episcopal Church South and the Methodist Episcopal Church North. The Court held that the commissioners acting for the Methodist Episcopal Church South were properly qualified and could maintain a representative suit. No constitutional question was presented.

C. The Third Reason.

Petitioners' third reason (Pet. 13) is again based upon the wholly false assumption that no hearing was accorded them below. We have already referred to the three cases cited in support of this reason and they have no application to a situation such as that presented in the case at bar where the parties were accorded full hearing upon the merits of the case made by their pleadings and were offered an opportunity to amend their pleadings and declined to do so (*supra*, pp. 3, 5; DJR 5, lines 3-6; QTR 10, lines 17-20).

D. The Fourth Reason.

The cases cited in support of Petitioners' fourth reason (Pet. 13) do not have even a remote resemblance to the situation here presented.

In *Marino v. Ragen*, 332 U. S. 561 (1947), a boy of 18 who did not understand English was convicted of murder on a plea of guilty, although he had no lawyer and the arresting officer acted as interpreter. The Attorney General of Illinois admitted that the writ of habeas corpus should have been granted and the judgment below was accordingly reversed.

In *Brinkerhoff-Faris Company v. Hill*, 281 U. S. 673 (1930), plaintiff sued to enjoin a discriminatory applica-

tion of the Missouri tax law. The Missouri Court dismissed the suit on the ground that plaintiff should have exhausted his remedy before the Tax Commission. The Missouri Courts had theretofore consistently held that there was no remedy before the Tax Commission. The case was remanded to the Missouri Court to determine whether plaintiff's claim raised a question under the equal protection clause of the Constitution, and the Missouri Supreme Court reversed itself and enjoined the discriminatory part of the tax (42 S. W. 2d 23).

In *Lee Van Woods v. Nierstheimer*, 328 U. S. 211 (1946), the Illinois Court had denied a writ of habeas corpus on the ground that it was not the proper remedy under the Illinois procedure but that a writ of error *coram nobis* was the proper remedy. This Court held that the question as to the appropriate remedy was merely one of State law and the writ of certiorari was dismissed.

There is no doubt that the Petitioners herein had an adequate remedy at law if they had not delayed until long after their claim had been barred by the provisions of the McIntyre Act (Pet. 31) fixing a time limit for filing claims against banks in liquidation. Thus in disposing of Petitioners' contention that they did not have a plain and adequate remedy at law and were therefore entitled to a writ of mandamus, the Supreme Court of Ohio stated (146 O. S. 348, 373):

> "In the *Hart* case relators here had a plain and adequate remedy in the ordinary course of the law authorized by Section 710-92 and Section 710-95, General Code. They lost there not because the action was not properly brought but because their claims had not been filed within the time limited by law.
>
> "The Banking Act (Section 710-89 *et seq.*, General Code) provides a plain and adequate procedure for the liquidation of banks and the determination of all claims arising in the course of such liquidation. * * *."

A Statute of Limitations or of non-claim may frequently deprive a claimant of all rights if suit is not brought within the designated period. This does not mean that a party has been illegally or unconstitutionally deprived of his rights.

> *Terry v. Anderson*, 95 U. S. (5 Otto) 628, 633 (1877); *Smith v. New York Central Rd. Company*, 122 O. S. 45, 49 (1930).

No such hardship is imposed upon the Petitioners here. They still retain the trust property which they have enjoyed continuously for more than twenty-four years and no one except the Petitioners themselves, their counsel and those who have been associated with them from time to time in this litigation has ever suggested any doubt as to their right to retain the property and enjoy it forever.

Obviously, parties who are afforded an adequate remedy and lose it because of their own laches or delay cannot complain that they have been denied due process.

III. THE BRIEF OF THE OHIO ATTORNEY GENERAL SUGGESTS NO REASONS FOR GRANTING THE WRITS.

A most remarkable situation is here presented. After almost eight years of litigation (QTR 39-40), covering the administration of four Superintendents of Banks and two Attorneys General of Ohio,[*] during all of which period these public officials have consistently opposed the contentions of Petitioners and their counsel, the new Attorney General who took office on January 10, 1949 has filed a brief supporting Petitioners' request that this Court grant the writs.

On September 1, 1948 Paul A. Mitchell, then and now Superintendent of Banks of the State of Ohio, acting by

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[*] The Superintendents of Banks have been Rodney P. Lien until January 15, 1942, William L. Hart until October 19, 1943, H. Earl Cook until May 1, 1947 and Paul A. Mitchell since that time. The Attorneys General have been Hon. Thomas J. Herbert 1941-44; Hon. Hugh S. Jenkins 1945-48.

the Ohio Attorney General, filed a brief in the Supreme Court of Ohio in the two cases at bar in which he urged:

1. That the motions to certify be denied.

2. That "no substantial constitutional questions are presented and that the appeals as of right should be dismissed in both cases."

We have no reason to suppose that Mr. Mitchell, who is still Superintendent of Banks, has in any way changed his position.

There is no suggestion in the Attorney General's brief that any Federal question is here presented. Assuming, as we should, that the Attorney General knows that this Court's jurisdiction to review is limited to such questions, this omission is particularly significant. As a matter of fact, the Attorney General's brief is merely a rehash of arguments which the Petitioners and their counsel have been presenting over a period of almost eight years and of which the Ohio Supreme Court has completely disposed. It is, for example, contended (Duffy Br. 8) that the Superintendent of Banks is charged with a duty of enforcing "the public policy of the State." This was precisely the basis of the Petitioners' argument when they sought a writ of mandamus in *State ex rel. v. Cook*, 146 O. S. 348, and the Ohio Supreme Court emphatically denied this contention, see paragraph 7 of syllabus and pages 375-6.

In an attempt to show some previous inconsistencies in the positions taken by the Superintendent of Banks, the Attorney General quotes a part of one sentence from the Superintendent's answer to Petitioners' cross-petition in the Quiet Title case (Duffy Br. 9). It is significant to observe however (1) that the Superintendent had previously filed an answer in the Quiet Title case disclaiming any right to or interest in the trust property (QTR 1, 24), (2) that the sentence, of which the Attorney General quoted a part, concluded as follows (QTR 41):

"* * *, but they do consider it to be their duty to respectfully suggest to the Court that the certificate holders will be deprived of their property if the trust is held invalid since the Supreme Court of Ohio in the Stanley case (mandamus) forever barred the certificate holders from being claimants or creditors of said The Union Trust Company."

The argument of the Attorney General (Duffy Br. 11) that "a determination is necessary to clear the title to the property and to terminate the liquidation of The Union Trust Company * * *" is wholly without substance. The disclaimer of any right, claim or interest in the property by the Superintendent of Banks, the decision of the Ohio Supreme Court in the *Hart* and *Cook* cases and the decree in the Quiet Title case quieting the title of The National City Bank as Successor Trustee against any claims of the Superintendent of Banks or Union Properties, Inc. make it clear that a determination of the academic question as to the original validity of the trust is neither necessary nor proper.

It is, of course, clear that no questions are here involved as to the soundness of the decision below as a matter of State law.

Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U. S. 157, 165-6 (1917).
American Railway Express Company v. Kentucky, 273 U. S. 269, 272-3 (1927).

However, in view of the position taken by the Attorney General we shall address ourselves briefly to the soundness of the decisions below.

A. The Decisions of the Lower Court Were Sound and Just Under the State Law.

By their petition in the Declaratory Judgment case and their cross-petition in the Quiet Title case Petitioners sought to have determined the wholly academic question whether the trust created in 1924 was originally valid.

The Court determined in the Quiet Title proceeding that the trust is not now subject to attack by any party to this litigation, and quieted the title of the Trustee for the benefit of the Certificate Holders, including the Petitioners. In so doing the Court pointed out that Petitioners were merely trying to relitigate the questions which had been determined against them in the prior litigation (DJR 87, 90; QTR 77, 80-81).

The fact is moreover that Petitioners did not present any facts in either case which stated a cause of action.

B. The Declaratory Judgment Case (No. 549).

The petition in the Declaratory Judgment case was defective both because it showed that Petitioners were merely trying to relitigate the questions determined in the prior litigation between the same parties as to the same subject matter, and because they failed to state any justiciable question in that they took no position as to the validity or invalidity of the trust (DJR 19). The law is firmly established in Ohio, as elsewhere, that relief may be had by Declaratory Judgment only when "a real controversy between adverse parties exists which is justiciable in character and speedy relief is necessary to the preservation of rights that may be otherwise impaired or lost."

Schaefer v. First National Bank, 134 O. S. 511, 18 N. E. (2d) 263 (1938);

Driskill v. City of Cincinnati, et al., 66 O. App. 372, (Hamilton County, 1940);

Eccles v. Peoples Bank, 333 U. S. 426 (March 15, 1948);

Liberty Warehouse Co., et al. v. Grannis, 273 U. S. 70, 47 Sup. Ct. 282 (1927);

Humble Oil & Refining Co. v. State Mineral Board, et al., 32 F. Supp. 45 (D. C., W. D. Louisiana, 1940);

Reese v. Adamson, 297 Pa. 13, 146 Atl. 262 (1929).

In view of this well established rule and Petitioners' failure to take any position as to the validity of the trust (DJR 19) the lower Courts had no alternative but to dismiss the petition and to render final judgment upon Petitioners' refusal to plead further.

C. The Quiet Title Proceeding (No. 550).

The decree of the trial Court in the Quiet Title case (a statutory proceeding, Ohio G. C. 11901) quiets the title to the trust property in The National City Bank as Trustee for all of the Certificate Holders, including Petitioners, and enjoins all parties from interfering with the title and possession of the Successor Trustee (QTR 10-11). Thus all Certificate Holders, including Petitioners, are conclusively protected against any possible interference with the trust property.

The cross-petition of the Petitioners did not assert any interest in the property. On the contrary, the very foundation of their position throughout this litigation has been that they had *no* interest in the property. Petitioners did assert that the title to the property should properly be in the Superintendent of Banks because of the original invalidity of the Trust. Thus, Petitioners were attempting to relitigate the issues decided in the *Hart* and *Cook* cases and to set up as a defense in a quiet title proceeding, a title in some third party (the Superintendent) with whom they claimed no privity. It has been settled in Ohio for more than 80 years that a defendant in a quiet title proceeding cannot attack the plaintiff's title on the ground that some third party, with whom such defendant is not in privity, has a title superior to plaintiff's.

In *McKinzie v. Perrill*, 15 O. S. 162 (1864), it was expressly held that a defendant in a quiet title proceeding could not set up a countervailing equity in a third person with whom he was not in privity. Thus, the court said (169):

"* * * But, waiving all other questions as to the competency of this proof, it seems to us that the defendant, Perrill, can not be allowed thus to set up a countervailing equity in third persons, with whom he is not in privity, and who, being parties to the suit, by their silence disclaim for themselves, and in the plaintiff's favor, the title, which he, a stranger, seeks to thrust upon them."

In view of Petitioners' failure to claim any interest in the property the Courts below had no alternative but to rule a pleading deficient which asserted no rights in the subject matter of the action.

CONCLUSION.

We respectfully submit that no Federal questions are presented and that the writs of certiorari should be denied.

Respectfully submitted,

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